BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NORMA JEAN FOSTER Claimant VS. **NORTH AMERICAN VAN LINES, INC.** Respondent AND **NATIONAL UNION FIRE INSURANCE CO.** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 137,151

ORDER

Respondent and its insurance carrier requested review of the Award entered by Special Administrative Law Judge William F. Morrissey dated February 17, 1994. The Appeals Board that was subsequently found unconstitutional by the Kansas Supreme Court in Sedlak v. Dick, 256 Kan. 779, 887 P.2d 1119 (1995) rendered a decision in this proceeding on October 31, 1994. That decision was appealed to Kansas Court of Appeals in Docket No. 73,116. In its opinion filed March 29, 1996, the Court of Appeals remanded this proceeding to the present Appeals Board.

Appeals Board member Duncan Whittier has recused himself from this proceeding. By appointment dated May 3, 1996, Jeff K. Cooper has been appointed to serve as Appeals Board Member Pro Tem.

APPEARANCES

The claimant appeared by her attorney, C. A. Menghini of Pittsburg, Kansas. The respondent and its insurance carrier appeared by their attorney, Mark E. Fern of Pittsburg, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Blake Hudson of Fort Scott, Kansas. There were no other appearances.

RECORD & STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the parties agree the Special Administrative Law Judge's findings regarding average weekly wage and temporary total disability benefits are correct.

ISSUES

The Special Administrative Law Judge found claimant was a statutory employee of the respondent and awarded claimant permanent partial disability benefits for an 80 percent work disability. The respondent and its insurance carrier requested this review and asks the Appeals Board to review the following issues:

(1) Whether the parties are covered by the Kansas Workers Compensation Act.

(2) Whether the relationship of employer and employee existed on the date of accident.

(3) The nature and extent of claimant's injury and disability.

In addition, after the Court of Appeals remanded this proceeding to the Appeals Board, claimant filed a request for this Board to remand the proceeding to the Special Administrative Law Judge to take additional evidence regarding work disability. Therefore, in addition to the above three listed issues, claimant's request for remand is also to be decided by the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Special Administrative Law Judge should be modified.

1. Claimant's request for remand.

The Appeals Board finds that claimant's request for remand should be denied. Nature and extent of disability was designated as an issue to be decided by the Special Administrative Law Judge. All parties were given adequate opportunity to present their evidence of that disputed issue, and there appears no compelling reason to reopen the record at this time to present evidence that was readily available before the expiration of terminal dates.

2. Whether the parties are covered by the Kansas Workers Compensation Act.

The claimant met with personal injury by accident on April 1, 1987. The claimant was injured when a tractor trailer truck she was driving collided with another tractor trailer on April 1, 1987. The accident and injury occurred in Effingham, Illinois. The tractor trailer unit claimant was driving belonged to Mr. Maurice King. King had an exclusive contract to haul freight for the respondent North American Van Lines. The claimant testified she was hired by King to drive the truck leased to North American Van Lines. The claimant testified

she was initially offered a job as a co-driver by King, via telephone, while claimant was in Kansas. The claimant testified that she accepted the offer of employment by telephone from her residence in Pittsburg, Kansas. Subsequently, King picked up the claimant in Joplin, Missouri, to begin work.

After beginning work with King, claimant completed a road test, written test, DOT physical, and all requisites of North American Van Lines to drive a tractor trailer unit. From March 10 through April 1, 1987 claimant worked as a co-driver for King pulling a North American Van Lines trailer. When she began working for King, claimant had a valid chauffeur's license and was certified to drive a tractor trailer unit.

North American Van Lines acknowledged claimant as an employee on Indiana workers compensation documents and acknowledged National Union Fire Insurance Company as the insurance carrier. On the date of injury, claimant was designated "temporarily qualified" and after the accident was designated "fully qualified".

K.S.A. 44-506 provides in pertinent part:

> ". . . *Provided*, That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides. . . ."

There is no evidence of record to support a finding that Kansas was the principal place of employment as contemplated in K.S.A. 44-506. *See* Knelson v. Meadowlanders, Inc., 11 Kan. App. 2d 696, 732 P.2d 808 (1987). However, claimant instead relies on the second part of the test set forth in K.S.A. 44-506. Claimant relies on the testimony pertaining to the telephone conversation with King and contends that the telephone conversation constitutes a contract made in Kansas. Respondent contends that the contract of employment was not formed in Kansas because claimant had to take the DOT physical, perform the written and driving tests, and complete other steps to become fully qualified by North American Van Lines.

Claimant testifies she was offered a job by King by telephone when she was living in Kansas and contends that the offer was accepted by her in Kansas. No evidence to the contrary was offered to refute the offer being made while claimant was in Kansas, nor was there any evidence presented to refute the acceptance. Therefore, the Appeals Board finds this contract was made in Kansas.

The Kansas Supreme Court has held that a contract is made in Kansas when the last act necessary to form the contract is performed in Kansas. Smith v. McBride & Dehmer Construction Co., 216 Kan. 76, 530 P.2d 1222 (1975). In Pearson v. Electric Service Co., 166 Kan. 300, 201 P.2d 643 (1949), the court held that "where an acceptance is given by telephone the place of contracting is where the accepter speaks his acceptance." *Id*. at 302. *Accord*, Neumer v. Yellow Freight Systems, Inc., 220 Kan. 607, 556 P.2d 202 (1976). In this proceeding, the last act necessary to complete the employment contract between King and claimant was her acceptance of King's offer during the telephone conversation mentioned above.

Respondent argues the final act necessary to complete the contract was performed in Indiana, the state of respondent's home office. However, the evidence supports that co-

drivers were paid by the owner-operator, in this case King, and there is no evidence to suggest that King did not have authority to hire co-drivers. The Appeals Board finds that the contract of employment between the claimant and King was made in the state of Kansas and King was in the business of operating tractor trailer units for respondent. Claimant was employed by King to carry out respondent's contracts to deliver North American Van Lines' freight around the country. The Appeals Board therefore finds that the parties are covered by the Kansas Workers Compensation Act under the provisions of K.S.A. 44-506.

3. Whether the relationship of employer and employee existed on the date of the accident.

As indicated above, the claimant was hired by King to operate a tractor trailer unit to haul freight for North American Van Lines. The evidence clearly establishes that King paid claimant as co-driver for purposes of completing contractual obligations between King and North American Van Lines. The evidence also establishes at the time of the accident claimant was actually driving a tractor trailer unit and hauling goods for North American Van Lines as a "temporarily qualified" driver. There can be no doubt that part of North American Van Lines trade or business is to transport goods from one place to another by tractor trailer unit. Claimant was hired as a co-driver to further the trade or business of the respondent, North American Van Lines. The evidence clearly reflects a contract between North American Van Lines and King to transport goods for North American Van Lines.

K.S.A. 44-503(a) provides as follows:

> "Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under the workmen's compensation act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workmen's compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed."

The purpose of the statutory employer provision was set forth in Atwell v. Maxwell Bridge Co., 196 Kan. 219, 409 P.2d 994 (1966), as follows:

> "The purpose of this statute is to give employees of a subcontractor a remedy against the principal contractor and prevent employers from avoiding liability to an injured workman by contracting with an independent contractor to do a portion of the work undertaken by the principal. The statute, being primarily for the benefit of the injured workman, also provides protection when no recovery can be had against the subcontractor or its insurance carrier because they are financially unable to pay the compensation award." *Id*. at 221. [Cites omitted.]

The Appeals Board finds that the claimant was a statutory employee of North American Van Lines on the date of the accident. The contract of employment between King and North American Van Lines serves as the basis for predicating liability pursuant to K.S.A. 44-503(a). *See* Ellis v. Fairchild, 221 Kan. 702, 562 P.2d 75 (1977). The statutory employer's statute is to be liberally construed to effectuate the purposes of the Workers Compensation Act. Bailey v. Mosby Hotel Co., 160 Kan. 258, 160 P.2d 701 (1945).

The work that was performed by the contractor King and claimant was an inherent and intricate part of respondent North American Van Lines' principal trade or business. Further, the work being done by King and the claimant would ordinarily have been done by employees of North American Van Lines had North American Van Lines not contracted with King. *See* Woods v. Cessna Aircraft Co., 220 Kan. 479, 553 P.2d 900 (1976).

4. The nature and extent of claimant's disability.

After her release from the hospital and her return home, the claimant was initially treated by Dr. Adolph Mueller, a board-certified orthopedic surgeon beginning in July of 1987. Her complaints at the initial examination by Dr. Mueller on July 6 and July 9, 1987, consisted primarily of wrist complaints. Dr. Mueller performed left carpal tunnel release surgery on October 29, 1987, and right carpal tunnel release surgery on December 1, 1987. Dr. Mueller continued to follow the claimant and on March 15, 1988, released claimant to return to work and rated her condition as 5 percent functional impairment to each upper extremity.

The claimant next saw Dr. Ernest Neighbor on November 21, 1988. At that time, claimant was experiencing symptoms similar to those she had experienced in her wrist before the bilateral carpal tunnel releases. Claimant had positive Phalen and Tinels tests on both wrists reflecting recurrent bilateral carpal tunnel problems. Dr. Neighbor found that claimant was experiencing recurrent bilateral carpal tunnel syndrome. Claimant's hands were going to sleep and were waking her at night. Dr. Neighbor had additional testing done and continued to periodically see the claimant. Dr. Neighbor saw the claimant on May 8, 1989 at which time she had similar complaints. Dr. Neighbor also diagnosed a C-6 radiculopathy on the left side and testified claimant injured a cervical disc in the April 1, 1987 accident. On October 29, 1990, Dr. Neighbor issued a report rating the claimant at 17 percent permanent partial impairment to the body as a whole. He also indicated that he did not think she could return to driving a truck because he did not feel she could grip the steering wheel for an eight-hour period. Dr. Neighbor did feel that she could drive for shorter periods of time and could do light to moderate lifting.

Dr. Neighbor next saw the claimant on December 26, 1990, and claimant was complaining of severe pain in her hands. Dr. Neighbor referred claimant to Dr. Cooley and Dr. Bennett for further treatment. Dr. Neighbor last saw the claimant on February 26, 1992. At the time of his last visit, Dr. Neighbor felt the claimant was suffering from scleroderma as well as continued median nerve compression. Dr. Neighbor indicates the scleroderma had definitely increased her disability. After that visit, Dr. Neighbor believed claimant had a 44 percent impairment to the whole body. Dr. Neighbor did not know if the scleroderma was related to the motor vehicle accident on April 1, 1987. Dr. Neighbor agreed that between his last visit with claimant on October 25, 1989, and his visit with claimant on December 26, 1990, there was a significant change in the claimant's symptoms and her condition had significantly worsened.

The claimant was involved in another collision on August 21, 1990. Dr. Neighbor agreed that the impact of the August 21, 1990 accident where the claimant's car struck a tractor trailer unit that turned left in front of her would be consistent with injuries to her neck. Dr. Neighbor first used the term "severe" to describe the claimant's pain after the August 21, 1990 accident. Dr. Neighbor indicated the claimant's symptoms were probably aggravated by the August 21, 1990 accident. Dr. Neighbor also indicated that the EMG taken after the August 1990 wreck showed a worsening of claimant's condition.

The claimant was referred by Dr. Neighbor in 1991 to David A. Cooley, M.D., who is board certified in internal medicine and rheumatology. Dr. Cooley first saw claimant on October 3, 1991. Nerve conduction studies done by Dr. Cooley were normal. The claimant had complaints of swollen hands, poor grip strength and lack of flexibility in her hands. Dr. Cooley testified all these symptoms were consistent with connective tissue disorders. Dr. Cooley further testified that swelling of the hands, puffiness, and inability to make a fist were not consistent with carpal tunnel problems. The claimant saw Dr. Cooley again in January of 1992 and Dr. Cooley tentatively diagnosed scleroderma. Dr. Cooley testified that scleroderma was not caused by trauma such as an automobile accident and the conditions he treated claimant for were not attributable to the motor vehicle accident of April 1, 1987. Dr. Cooley further testified that a good deal of claimant's present disability was attributable to scleroderma and not the accident of April 1, 1987.

The Appeals Board finds that after consideration of all the medical testimony, the claimant has met her burden of proof that as a result of the April 1, 1987 accident, claimant suffered bilateral carpal tunnel syndrome injury and a cervical spine injury at the C-6 intervertebral level. Further, claimant has developed, apart from the work-related injury, a connective tissue disorder known as scleroderma. The evidence establishes that the connective tissue disease is the cause of much of claimant's disability.

The Appeals Board finds that the opinion of Dr. Neighbor who treated, released and rated claimant before diagnosis of the connective tissue disease and before symptoms attributable to that condition arose most accurately defines the impairment attributable to the April 1, 1987 accident. Dr. Neighbor rated the claimant at 17 percent permanent partial impairment to the body as a whole as a result of her work-related injury. Dr. Neighbor's 17 percent rating of October 29, 1990, does not take into account the impairment attributable to the connective tissue disorder and the Appeals Board finds that the 17 percent whole body rating of Dr. Neighbor on October 29, 1990 should be adopted as the functional impairment suffered by claimant as a result of her April 1, 1987 accident.

Regarding work disability, Dr. Neighbor issued restrictions on October 29, 1990, which were based strictly on her physical condition attributable solely to the April 1, 1987 injury. Dr. Neighbor indicated that the claimant could not grip the steering wheel for an eight-hour period. Dr. Neighbor, however, did indicate claimant was capable of driving shorter periods of time and capable of light to moderate lifting.

Prior to July 1, 1987, K.S.A. 44-510e(a) defined work disability as follows:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the workman to engage in work of the same type and character that he was performing at the time of his injury, has been reduced."

In Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976) the Supreme Court defined work disability as that portion of the job requirements that a worker

is unable to perform by reason of an injury. Further clarification of the pre-July 1, 1987 work disability test is found in Ploutz v. Ell-Kan Co., 234 Kan. 953, 676 P.2d 753 (1984). In Ploutz, the court stated that the test for determining permanent partial general disability is the extent to which the injured worker's ability has been impaired to engage in work of the same type and character the worker was performing at the time of the injury. Under the Ploutz decision, the pivotal question is what portion of claimant's job requirements is claimant unable to perform because of the injury sustained at work. Therefore, the fact claimant cannot return to the job she had when she was injured is not determinative.

Based on Dr. Neighbor's restrictions, it is questionable whether claimant could return to her job as a co-driver for respondent without violating Dr. Neighbor's work restrictions. However, as noted by the court in Ploutz, the proper test for permanent partial disability or work disability is what portion of the claimant's job as co-driver that she was performing on the date of the injury can she no longer perform. Unfortunately, the record does not contain significant evidence of claimant's duties or job tasks as a co-driver to determine what portion of those tasks claimant can no longer perform as a result of her work-related injury. Because claimant can do some driving and some light to moderate lifting and she apparently was not required to drive the whole time, there undoubtedly would be some portions of the job as co-driver she could perform after her injury which would not violate the permanent work restrictions and limitations placed upon her as a result of her work-related accident.

K.S.A. 44-501(a) places the burden of proof on all issues squarely on the claimant to prove the various conditions on which the claimant's right to compensation depends.

After careful review of the entire record, the Appeals Board finds that the claimant has failed to meet her burden of proof in establishing what portion of her job she is unable to do as a result of the injury and therefore has failed to meet her burden of proof in establishing a work disability in this case. The Appeals Board, therefore, finds that claimant is not entitled to compensation for a work disability and that the Award should be based upon her whole body functional impairment rating of 17 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated February 17, 1994, should be, and hereby is, modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR of claimant, Norma Jean Foster, and against the respondent, North American Van Lines, Inc., and the insurance carrier, National Union Fire Insurance Company, and the Kansas Workers Compensation Fund for an accidental injury which occurred on April 1, 1987 and based on an average weekly wage of $200.00, for 125.29 weeks of temporary total disability compensation at the rate of $133.34 per week in the sum of $16,706.17 and 289.71 weeks of permanent partial disability compensation at the rate of $22.67 per week in the sum of $6,567.73 for a 17% permanent partial impairment to the body as a whole making a total award of $23,273.90.

As of March 15, 1995, there is due and owing claimant 125.29 weeks of temporary total disability compensation at the rate of $133.34 per week in the sum of $16,706.17 and 289.71 weeks of permanent partial disability compensation at the rate of $22.67 per week in the sum of $6,567.73 making a total due and owing of $23,273.90, less amounts previously paid.

Pursuant to agreement by the parties, the Kansas Workers Compensation Fund is ordered to pay 20% of all amounts paid or to be paid on this claim, including expenses of administration.

Unauthorized medical expense up to $350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed 80% to the respondent and 20% to the Kansas Workers Compensation Fund to be directly paid as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Delmont Reporting Services	
Transcript of Preliminary Hearing (8/18/89)	226.05
Transcript of Preliminary Hearing (5/02/91)	75.80
Transcript of Preliminary Hearing (6/17/91)	106.10
Transcript of Preliminary Hearing (8/30/91)	68.65
Transcript of Preliminary Hearing (9/26/91)	60.15
Transcript of Regular Hearing	79.90
Deposition of Norma Jean Foster (12/29/92)	446.10
Deposition of Don R. O'Brien	171.30
Hostetler & Associates	
Deposition of Ernest H. Neighbor, M.D. (1/29/93)	328.45
Deposition of David A. Cooley, M.D.	254.80
Deposition of Ernest H. Neighbor, M.D. (6/15/93)	251.80
Pettigrew Reporting	
Deposition of Rose M. Ehle	311.65
Patricia K. Smith	
Deposition of Adolph R. Mueller, M.D.	229.90
Deposition of Norma Jean Foster (4/21/93)	280.80

IT IS SO ORDERED.

Dated this ____ day of June 1996.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: C. A. Menghini, Pittsburg, KS
Mark E. Fern, Pittsburg, KS
Blake Hudson, Fort Scott, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director